CHANCERY BAR

CIVIL COURTS STRUCTURE REVIEW: INTERIM REPORT

ON BEHALF OF THE CHANCERY BAR ASSOCIATION

Introduction

1. The Chancery Bar Association ("ChBA") is one of the longest established Bar Associations and represents the interests of over 1,250 barristers. Its members handle the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales and in cases overseas. It is recognized as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

2. The Chancery Bar Association (ChBA) has been asked by Lord Justice Briggs to provide its views on the Civil Courts Structure Review: The Interim Report ('the Report'). This paper has been drawn up by a small working group, and takes into account the views expressed by those ChBA members who responded to a request for comments.

3. The ChBA strongly supports any and all steps to improve access to justice. The ChBA has already responded with the CLIPS and PILARS pro bono representation schemes and would welcome any new initiative to tackle the problem. It also supports digitisation of the court process.

4. It has provided its responses to the questions in the attached excel spreadsheet. However, we make some overarching points in this paper. The ChBA has been asked for a considered response in a timeframe that is particularly short. The Report raises wide-ranging issues and contain important constitutional ramifications. It is disappointing that such important and potentially widely impacting decisions should be taken with apparently limited empirical research and so hastily.

Online Court.

5. The ChBA supports the digitisation of the court process and any step to assist litigants in person. The process in the existing courts and tribunals has not yet been digitised and progress on that is slow.

6. The proposals set out in the Report would appear to amount to (or risk amounting to) a separate freestanding set of digitisation proposals rather than comprising an adaption of the digitised system applying generally across the courts and tribunals for the benefit of LIPs.

7. The ChBA believes the Online Court should not be developed as a self-standing system; rather it should be developed as an adaption of the overall digitised system (or at least with the benefit of experience of the development and use of overall digitisation of the courts).

8. If developed as a standalone system, we are concerned that there will be discrepancies between the adaptions (if any) of the general court digitised process for LIPs, and the specifically created digitised system for the Online Court (primarily used by LIPs).

9. We are also concerned that to the extent the Online Court involves use of the resources (staff and judiciary) of the courts and tribunals there should not be a separate digitised process which is unable seamlessly to be used in the same manner by all court users and in cases where dispute resolution moves form the Online Court to the main courts (e.g. appeals).

10. Furthermore, we are concerned that the first meaningful digitisation will be trialled on LIPs rather than professional court users. That is of concern because these litigants are likely to be the most vulnerable users and the most unable to seek redress or amendment of the system should errors occur. In comparison, professional lawyers can be expected to navigate an untested online system with greater ease, derived from their professional experience, capabilities, and resources, and with the confidence of professionals to raise or deal with errors or difficulties that might arise. LIPs are likely to be in a very different position. We are concerned that a significant number of potential users of the Online Court may have a low level of IT literacy and access to computers.

11. There is a separate point which is we are unclear how far proper empirical evidence supports the need or justification for the online court on a cost-benefit analysis.

12. In brief on the detail of the matters:

(a) The triage or "walk-through" to assist LIPs in formulating their case and promoting the provision of relevant detail is a suggestion that the ChBA strongly supports[1]. We note that it could be designed as a stand-alone element or as part of a wider process. We would anticipate that its designers will exclude any legal liability or responsibility to its users. It is unlikely completely to replace the provision of legal advice or (because it will likely be broad "headline points") replace the eliciting of information from LIPs by Judges. It would therefore be a useful tool but not a complete replacement for either of the above two elements. Beyond simple money claims, it may be difficult to provide nuanced triage forms that elicit the necessary information.

(b) We are unpersuaded that lawyers will be excluded from the process and in any event question whether that is desirable. We are concerned that "assistance" in this process may leave vulnerable LIPS exposed to unregulated people charging for such "assistance". This would leave the vulnerable in the hands of those who may seek to exploit them, as well as those who offer well-meaning but detrimental advice. There are currently no safeguards to prevent this occurring. Further, assistance on completing forms runs the risk of sliding into the provision of legal advice and potentially the conduct of litigation (depending on how much assistance was given) conducting litigation, two matters that would cause concern to law students and which they are not qualified to undertake. Pro bono volunteers (particularly law students) may have limited litigation experience, limited time and likely limited ability to provide continuity of service to the LIPS. While their pro-bono contributions can be valuable, they are usually conducted under the supervision of regulated lawyers. Assistance provided outside the supervision of regulated lawyers should be viewed with caution and as of limited value.

(c) The CPR can apply and be embedded into the Online Court (i.e. timeframes for responses, options to select ENE etc.). The CPR would provide a structure which can be adapted to the online court and provide a fall back structure where the specific online court rules leave gaps or the case is transferred. We are concerned that another set of rules will simply add to the complexity of the procedural rules in force. Further, we are concerned there will inevitably be gaps in any newly devised "simple" system of court rules. The experience in the tribunals has shown the dangers of a completely self-standing set of rules. In certain situations the CPR have had to be applied by analogy, and so have formed fall back rules in any event. The position is worse than

[1] We note that the Court of Protection has similar forms, which could easily be placed online. These sort of forms or walk-throughs are likely to be beneficial to all court users.

this though, as on occasion when applied by analogy the application has been apparently different to the courts' application of the same rule.

13. We do welcome any provision that ensures that LIPS receive the best access to justice. Often, in our experience, they do not express themselves well in writing and respond well to a dialogue in order to elicit their case. Currently issues are teased out by judges and opposing counsel. It may be that the proposed Stage 2 will need to incorporate some of those elements in order to be effective.

14. We also anticipate that the OC will be subject to cost-benefit analysis prior to its creation. In the current times of limited budgets, we consider it important (and anticipate that the authors of the Report share this view) that the limited money available to improve access to justice and/or digitisation is spent prudently and as effectively as possible.

15. We also consider it is essential that this new venture in digitisation is very carefully planned over time and with the heavy involvement of potential users rather than it being designed and provided by expert IT personally and/or lawyers who are not the intended end users.

16. The reputational damage were the system either not to work, or to have to be replaced within a short period, cannot be underestimated, and the cost consequences could be substantial. As stated in our attached spreadsheet, we strongly support the piloting of this scheme before wider implementation.

<u>Case Officers</u>

17. Our comments are in the attached spreadsheet. The suggestion of CO does appear to be against the current trend for judge-led case management. We are not clear how this fits with that movement or the principle that civil justice should be actively case managed by judges.

18. We understand from the Report that the proposal regarding CO is to limit their function to procedural matters. We wholeheartedly agree that they should not be engaged in substantive determinations. We also note that many procedural applications can have

wide-ranging impact upon the parties' substantive hearings and that these ought to be determined by a judge[2].

General

19. We mentioned in the introduction that the Report raises constitutional issues. Depending on the final architecture of the Online Court, underlying the Report there seems to be an assumption that the public's right to have their legal rights determined by a State provided court should become an obligation to have their rights determined by an entity where the aim is to exclude legal advice and guidance from lawyers and where potentially important legal decisions affecting their rights are to be made by non-legally qualified civil servants. The arguments of cost effectiveness and convenience should not be permitted to conceal the constitutional issues thereby raised, nor the fact that once this principle is established, it will be capable of being applied to the whole legal system.

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ChBA Working Group

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[2] Otherwise we would be concerned at the constitutional propriety of such a step